SUPREME COURT U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 1240

Supreme Court, U.S.
FILED
APR 6 1967
JOHN F. DAVIS, CLERK

CREAM CREST-BLANDING DAIRIES, INC.,
Petitioner,

-v-

NATIONAL DAIRY PRODUCTS CORP.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DOUGLAS K. READING
Ann Arbor Trust Building
Ann Arbor, Michigan

J. M. NEATH, JR.
CHARLES E. McCALLUM
One Vandenberg Center
Grand Rapids, Michigan 49502
Counsel for Petitioner

OF COUNSEL:

Warner, Norcross & Judd
One Vandenberg Center
Grand Rapids, Michigan 49502

INDEX

	Page
Citations to Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	2
Reasons for granting the writ	3
Conclusion	7
Appendix A — Statute	9
B — Opinions and judgment below	10

CITATIONS

	Page
Cases:	
The Borden Co., F.T.C. Docket 7474	5, 6
Borden Co. v. Federal Trade Commission, 339 F. 2d 953 (7th Cir. 1964)	5
Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954)	3, 4
Willard Dairy Corp. v. National Dairy Products Corp., 309 F. 2d 943 (6th Cir. 1962), cert. denied, 373 U.S. 934	4
Statute:	
Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a)	2

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. _____

_____

CREAM CREST-BLANDING DAIRIES, INC.,
Petitioner,

-v-

NATIONAL DAIRY PRODUCTS CORP.,
Respondent.

_____

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on January 11, 1967.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court, printed in Appendix B hereto, *infra*, p. 11, is reported in 243 F.Supp. 331. The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, *infra*, p. 10, is reported in 370 F.2d 332.

JURISDICTION

The judgment of the Circuit Court of Appeals, *infra*, p. 16, was entered on January 11, 1967. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether sales in Michigan by a Delaware corporation which does business in many states and which advertises, operates, and sets policies on a nationwide basis, of products purchased and processed by it entirely within the State of Michigan, are sales "in commerce" as that term is used in the Robinson-Patman Act.

STATUTE INVOLVED

The statutory provision involved is Section 2(a) of the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. §13(a). It is printed in Appendix A, *infra*, p. 10.

STATEMENT

This is an action for treble damages under Section 13(a) of the Clayton Act (Section 2(a) of the Robinson-Patman Act). The jurisdiction of the District Court was invoked because the case arises under the Clayton Act.

Petitioner is a Michigan corporation conducting business as a handler of milk, milk products, and related items in the area around Greenville, Michigan. (*Infra*, p. 11.) Respondent is a Delaware corporation operating in Michigan and other states as a dairy and handler of milk, milk products and related items under the nationally advertised trade name "Sealtest." (*Infra*, p. 12; Appendix Below, pp. 12a, 23a-26a.)[1] Respondent's operations in the Greenville area are conducted through a processing plant and distribution center in Lansing, Michigan. This facility is a part of respondent's Michigan District, which includes areas in Ohio. (*Infra*, p. 12.) Ultimate control of respondent's Lansing operation

rests in officers and employees outside the state of Michigan. (*Infra*, p. 12.) The milk and milk products sold by respondent are processed in Michigan from milk purchased in Michigan. (Appendix Below, pp. 33b-34b.)

The amended complaint alleges price discrimination by respondent in the sale of milk, milk products, and related items within the state of Michigan. (Appendix Below, pp. 9a-11a.) At the completion of discovery, respondent moved for summary judgment on the ground that none of the purchases involved were in commerce. (Appendix Below, pp. 26a-28a.) The District Court granted respondent's motion for summary judgment on the ground that the alleged discrimination did not occur "in commerce," and the Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with the decision of this Court in *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954). In *Moore*, the defendant was one of an affiliated group of corporations operating in several states. With the exception of a single truck route into Farwell, Texas, defendant operated solely in New Mexico. When defendant cut its prices in the area where it competed with plaintiff, but not elsewhere, an action was brought under Section 2(a) of the Robinson-Patman Act. Reversing the determination of the Court of Appeals below, this Court held in *Moore* that the commerce requirement of the Robinson-Patman Act was satisfied, stating that "Congress by the Clayton Act and Robinson-Patman Act barred the use of interstate business to destroy local business." 348 U.S. at 120. The Court's reasoning does not rely on the chance existence of the Farwell truck:

---

[1] The record was not paginated by the Court of Appeals, and references, therefore, will be made by title to individual items within the record. The term "Appendix Below" will be used to refer both to Appellants' Appendix (page numbers followed by "a") and Appellees' Appendix (page numbers followed by "b").

"We think that the practices in the present case are also included within the scope of the antitrust laws. We have here an interstate industry increasing its domain through outlawed competitive practices. The victim, to be sure, is only a local merchant; *and no interstate transactions are used to destroy him.* But the beneficiary is an interstate business; the treasury used to finance the warfare is drawn from interstate, as well as local, sources which include not only respondent but also a group of interlocked companies engaged in the same line of business; and the prices on the interstate sales, both by respondent and by the other Mead companies, are kept high while the local prices are lowered. If this method of competition were approved, the pattern for growth of monopoly would be simple. As long as the price warfare was strictly intrastate, interstate business could grow and expand with impunity at the expense of local merchants. The competitive advantage would then be with the interstate combines, not by reason of their skills or efficiency but because of their strength and ability to wage price wars. The profits made in interstate activities would underwrite the losses of local price-cutting campaigns. No instrumentality of interstate commerce would be used to destroy the local merchant and expand the domain of the combine. But the opportunities afforded by interstate commerce would be employed to injure local trade." 348 U.S. at 119. (Emphasis added.)

In *Willard Dairy Corp. v. National Dairy Products Corp.*, 309 F.2d 943 (6th Cir. 1962), *cert. denied* 373 U.S. 934 (1963), the Sixth Circuit Court of Appeals had presented to it a case virtually identical to the present one. Reading *Moore* to turn on the existence of the Farwell truck route, the Sixth Circuit held in *Willard* that the commerce requirement of the Robinson-Patman Act was not met. Although this Court denied certiorari in *Willard*, Mr. Justice Black dissented from the denial:

"Moreover, I think the result below is irreconcilable with this Court's decision in Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954), in which we said that the Robinson-Patman Act condemns the monopolistic practice under which profits made in nondiscriminatory

interstate transactions are used to offset losses arising from discriminatory price-cutting at the local level. I believe that the Court of Appeals in the present case misconstrued both the statute and Moore when it held that respondent's interstate shipments 'from other than its Shelby, Ohio, plant' were 'wholly immaterial' to this case. Refusing to grant certiorari here means that this Court is allowing the economic resources and staying power of an interstate company to be used with impunity to destroy local competition, precisely the sort of thing the Robinson-Patman Act aimed to prevent. The present case presents an important question of price-cutting by interstate business with local plants, each of which services largely a local area but all of which draw on the economic power of the national operation. Judgments like the one left standing here make it difficult indeed for small independent, local companies to survive against the predatory assaults of their larger and more powerful interstate competitors." 373 U.S. 934 (1963).

2. The decision below conflicts with the interpretation placed upon the Robinson-Patman Act by the Federal Trade Commission, which is the agency charged with its administration. In *The Borden Co.*, F.T.C. Docket 7474, the Commission held that sales in Ohio by a Ohio plant of The Borden Company of milk purchased and processed in Ohio were "in commerce" as that term is used in the Robinson-Patman Act. The Commission stated:

> "Products sold by the large concern are truly products of the entire enterprise, not just the product of each local plant which happens to manufacture and distribute it. These economic characteristics of the large, modern, multistate corporation make archaic reliance on purely physical concepts when determining whether a product is in commerce. A product is in commerce when the forces establishing its price structure or distributional policy cross state lines."

In reaching this decision, the Commission relied upon *Moore* and specifically repudiated *Willard*. In *Borden Co. v. Federal Trade Commission*, 339 F.2d 953 (7th Cir. 1964), the Seventh Circuit Court of Appeals reversed the Commission on this

point, relying principally upon the holding of the Sixth Circuit in *Willard*.

3. The question here presented is of paramount importance in the administration of the Robinson-Patman Act. As witnessed by the recent milk strikes, the milk industry has a substantial impact on the United States economy. Furthermore, the milk industry is not alone in its susceptibility to selective price-cutting by large interstate concerns with localized operations. If the holding in *Willard* and in the present case is allowed to stand, small, independent, local companies will find it difficult to survive against their interstate competitors.

4. For the reasons stated above, the decision below is clearly erroneous and is an error of such importance that it should be reversed. In its decision in *The Borden Co.*, the Federal Trade Commission held that price-cutting of the nature involved there, and in this case, was precisely the "sort of commercial warfare which, indeed, the Robinson-Patman Act was designed to prevent."

All of the purchases involved in this case were made upon terms and conditions ultimately controlled by respondent's officers located outside the state of Michigan. All payments received by respondent accrued to its corporate treasury located outside the state of Michigan. This same treasury, drawn from sales in many states, served to finance the price-cutting employed by respondent. Whether predatory price-cutting falls within the prohibitions of the Robinson-Patman Act cannot turn upon whether or not physical molecules of milk cross an imaginary political boundary. A "purchase" is more than a mere delivery of goods. In the present case, all of the incidents of the purchases involved other than the mere physical delivery of the goods were interstate in nature.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: April 7, 1967.

Respectfully submitted,

Douglas K. Reading
Ann Arbor Trust Building
Ann Arbor, Michigan

J. M. Neath, Jr.

Charles E. McCallum
One Vandenberg Center
Grand Rapids, Michigan
49502

Counsel for Petitioner

OF COUNSEL:
Warner, Norcross & Judd
One Vandenberg Center
Grand Rapids, Michigan
49502

APPENDIX A

STATUTE

Section 2(a) of the Robinson-Patman Act 15 U.S.C. § 13(a) provides in pertinent part as follows:

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: June 19, 1936, c.592 § 1, 49 Stat. 1526.

APPENDIX B

JUDGMENT AND OPINIONS BELOW

No. 16, 835

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CREAM CREST-BLANDING DAIRIES, INC.,
Plaintiff-Appellant,

-v-

NATIONAL DAIRY PRODUCTS CORP.,
Defendant-Appellee.

Decided January 11, 1967.

Before PHILLIPS, PECK and McCREE, Circuit Judges.

PER CURIAM.

This is an action for treble damages under the Robinson-Patman amendment to the Clayton Act, 15 U.S.C. § 13a, for price discrimination in the sale of milk. The facts are set forth in the opinion of the District Judge Noel P. Fox granting summary for defendant, reported at 243 F.Supp. 331 (W.D.Mich.).

This case is controlled by the decision in Willard Dairy Corp. v. National Dairy Products Corp., 309 F.2d 943 (C.A. 6), cert. denied, 373 U.S. 934, rehearing denied, 375 U.S. 871. Appellants urge that the decision be reconsidered and overruled. This we decline to do.

The judgment of the district court is affirmed.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CREAM CREST-BLANDING DAIRIES, INC.,
Plaintiff,

-v- Civil Action No. 4337

NATIONAL DAIRY PRODUCTS CORP.,
Defendant.

OPINION ON RESPECTIVE MOTIONS FOR SUMMARY JUDGMENT

(Filed July 20, 1965)

Before FOX, District Judge.

Summary judgment motions have been filed by both parties in an action brought under Sections 15 and 26 of Title 15 of the United States Code, alleging violation by the defendant of the antitrust laws of the United States, and under Section 2 of the Clayton Act, seeking treble damages.

The specific issue which is the subject of these motions arises from the language of Section 2(a) of the Robinson-Patman Amendment to the Clayton Act, 15 U.S.C.A. § 13(a), which reads in relevant part as follows:

> "(a) *Price-Selection of Customers.* It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce * * *"

The facts of this case, for the purpose of this motion, are relatively brief. Plaintiff is a Michigan corporation conducting business within Michigan as a dairy and a handler of milk, milk products, and related items.

Defendant is a Delaware corporation operating in Michigan, and several other states as a dairy and handler of milk, milk products, and related items.

Plaintiff's original complaint, filed June 22, 1962, alleges price discrimination by defendant in connection with its milk and milk products. The evidence thus far before the court clearly establishes price differentials in the charge for half-gallons of milk by defendant during periods of 1961 and 1962, which are the times relevant to this action.

Defendant's Lansing, Michigan operation was, during the period involved in this action, included in defendant's geographic area known as the Michigan District, which includes areas located in Ohio.

Ultimate control over the Lansing plant reposes in officers and employees located outside the State of Michigan. Accounting for the plant was handled by a consolidated accounting center in Detroit, Michigan, which is also where defendant's Federal Market Reports were composed.

Defendant claims, and it is not disputed, that its Lansing operation purchased, processed and sold[1] milk all during the time in question, entirely within the State of Michigan, and that, therefore, the alleged discrimination did not occur "in commerce," as required by the statute, and accordingly no cause of action is stated.

Under the holdings of Willard Dairy Corp. v. Nat'l Dairy Products Corp., 309 F.2d 943 (CCA 6, 1962); cert. den. 373 U.S. 934, 83 S.Ct. 1554, 10 L. Ed.2d 691 (1963), and Borden Co. v. Federal Trade Commission, 339 F.2d 953 (CCA 7, 1962), this court has no other course to follow than to grant defendant's, and deny plaintiff's, motion for summary judgment.

---

[1] The purchasers to whom defendant made the alleged discriminatory sales were: (1) Charles Thurber of Stanton, Michigan; (2) Clare Ellafritz of Lakeview, Michigan; (3) those distributors located in Michigan within the area bounded by intersection of highways number 10, 131, 96 and 27; and (4) those purchasers identified on the summary of defendant's invoices filed with the court on February 17, 1965.

Willard involved the same defendant as appears in the case before this court, and bears essential factual similarity to this case. Judge Shackelford Miller in the opinion of the Court, wrote the following paragraph:

> "In the present case, the price discrimination relied upon was by reason of sales in the area of competition and sales in and around the City of Marion, Ohio. These sales by the defendant were from defendant's processing plant in Shelby, Ohio, and were purely intrastate transactions, not interstate in character, as is necessary to impose liability under the Robinson-Patman Act. The fact that defendant also made interstate shipments from other than its Shelby, Ohio, plant to areas in which the plaintiff did not engage in business is immaterial to the issue in this case. Davidson v. Kansas City Star Company, 202 F.Supp. 613, 618-619, W.D.Mo." (309 F.2d at page 946).

Thus, it is insufficient to show that defendant is an interstate operation; it must also be demonstrated that alleged discriminatory sales occurred in interstate, and not intrastate, commerce.

The Borden case, supra, supports the same finding. Leading textwriters are in substantial agreement with this interpretation of the Robinson-Patman Act. Kintner, An Antitrust Primer, p. 61, The Macmillan Company, 1964; Rowe, Price Discrimination Under the Robinson-Patman Act, p. 80, Little, Brown and Company, 1962.

Under the facts presently before the court therefore, there has been no showing of a violation of Section 2(a) of the Robinson-Patman Act by reason of the fact that there has been no proof that any of the alleged price discriminations occurred with relation to a transaction in interstate commerce.

Plaintiff also has a proposed amendment to the complaint before the court, seeking to introduce "related items," handled by defendant, into the case. There is proof to show that defendant ships orange juice from Florida to its Lansing plant, where it is offered for sale, again, to purchasers wholly within the State of Michigan.

There is no proof to show any alleged price discrimination with regard to this product, but it is plaintiff's contention that the entire line of dairy products handled by defendant constitutes a "commodity" under the meaning of the Act; that the "line" may thus be considered to be in interstate commerce, because at least one item thereof is; and that price discrimination as to one item of the line allows the entire line to compete unfairly, so that there is no need, under these circumstances, to supply proof of discriminatory pricing as to each item of the line—one is sufficient.

Plaintiff cites Moog Industries, Inc. v. Federal Trade Commission, 8 Cir., 238 F.2d 43, affd. 355 U.S. 411, 78 S.Ct. 377, 2 L.Ed.2d 370, and P. & D. Mfg. Co. v. Federal Trade Commission, 7 Cir., 245 F.2d 281, in support of this position as to "lines."

Those cases involved automobile parts dealers which sold their automotive parts as integral parts of clearly differentiated "lines," and rebates were accorded purchasers depending on the dollar volume of business within a particular line.

In the record before this court there is no evidence, other than the unsupported allegation of plaintiff, that defendant sells its products on such an integrated basis, or that any volume-based rebates are offered to purchasers.

Far more persuasive to this court is the case of Atalanta Trading Corp. v. Federal Trade Commission, 2 Cir., 258 F.2d 365. That case involved advertising allowances granted to some of the customers of the seller handling canned hams, pork shoulder and precooked Canadian bacon. It was contended that this required the seller to offer similar allowances on its entire line of pork products.

The commission's hearing examiner upheld the contention, stating that "ham is ham," and the Commission affirmed his decision. In reversing, the Second Circuit Court of Appeals said:

> "The test of products of like grade and quality was evolved to prevent emasculation of the section by a supplier's making artificial distinctions in his product but this does not mean that all distinctions are to be disregarded. Such a holding would lead to the conclusion that

> all articles of food are competitive, each with the other—an obvious absurdity. Merely because various articles of food are derived from a common source (in this case, the pig), should not force the vendor of a broad line of such products to market or promote all simultaneously and in an identical fashion. The dietetic habits of the consuming public are not to be controlled by judicial fiat." Id. at 371.

Thus, it does not appear to this court that a granting of plaintiff's amendment changes the decision.

However, plaintiff has indicated a desire to seek appellate review in the event of an adverse decision at the trial level, and in order to allow plaintiff the opportunity to present its case as fully as possible on appeal and to allow the pleadings to conform to the developed facts of the case, leave to amend is hereby granted.

Plaintiff's motion for summary judgment is denied.

Defendant's motion for summary judgment is granted.

An order may be presented in accordance with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 16,835

CREAM CREST-BLANDING DAIRIES, INC.,
Plaintiff-Appellant,

-v-

NATIONAL DAIRY PRODUCTS CORP.,
Defendant-Appellee.

Before: PHILLIPS, PECK and McCREE, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Western District of Michigan.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Defendant-Appellee recover from Plaintiff-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

_____
Clerk

SUPREME COURT, U. S.
FILED
MAY 9 1967
JOHN F. DAVIS, CLERK

No. 1240

In the Supreme Court of the United States

OCTOBER TERM, 1966

CREAM CREST-BLANDING DAIRIES, INC.,
Petitioner,

v.

NATIONAL DAIRY PRODUCTS CORP.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DAVID J. GIBBONS
GORDON B. WHEELER

Attorneys for Respondent
National Dairy Products Corporation

Dated: May 8, 1967

Of Counsel:

CHADWELL, KECK, KAYSER,
RUGGLES & MCLAREN
135 South LaSalle Street
Chicago, Illinois 60603

WHEELER, UPHAM, BRYANT & UHL
620 Old Kent Building
Grand Rapids, Michigan 49502

MCCORMICK AND HENDERSON, INC., CHICAGO

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1240

CREAM CREST-BLANDING DAIRIES, INC.,
Petitioner,

v.

NATIONAL DAIRY PRODUCTS CORP.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

QUESTION PRESENTED

Whether petitioner's Amended Complaint was properly dismissed where the undisputed facts established that the transactions about which petitioner complained involved wholly *intrastate* price differentials within an intrastate area in which petitioner and respondent allegedly competed, and that such differentials were, therefore, not made "in commerce" as required by the provisions of Section 2(a) of the Robinson-Patman Act.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The petition for certiorari involves a question that has been uniformly decided adversely to petitioner's contentions by the courts of appeals and district courts, and one

which this Court has previously declined to review on writs of certiorari. This petition does not involve a special or important federal question, and the lower courts have had no difficulty resolving it.

1. As petitioner acknowledges, the instant case is "virtually identical" to that presented to this Court in *Willard Dairy Corp.* v. *National Dairy Products Corp.*, 309 F.2d 943 (6th Cir. 1962), *cert. denied*, 373 U.S. 934, *rehearing denied*, 375 U.S. 871 (No. 824, 1962 Term) (Petition for Cert., p. 4). *Willard Dairy* and all of the prior and subsequent decisions on the commerce requirements of Section 2(a) of the Robinson-Patman Act have uniformly held that three separate jurisdictional elements must be present—the seller must be "engaged in commerce", the seller must act "in the course of such commerce", and "either or any of the purchases" must be "in commerce". (15 U.S.C. § 13(a); Appendix A to Petition for Cert.)

Petitioner cites Mr. Justice Black's dissent from the denial of certiorari in *Willard Dairy;* however, in this case petitioner was afforded the precise procedural right which concerned Mr. Justice Black in that dissent. Willard had not been allowed to amend its Complaint "to add," in Mr. Justice Black's language, "this simple but *necessary factual allegation*", *i.e.*, "any price discrimination which involved *sales across state lines.*" 373 U.S. at 934-35 (emphasis supplied). Here, petitioner's proposed amendment, although submitted 31 months after the original Complaint, after the close of discovery, and at the eve of trial, was allowed in full. Yet, on this Amended Complaint and the undisputed record, and in the words of Mr. Justice Black's dissent, the "necessary" discrimination "across state lines" was still totally absent from this litigation.

2. Both before and after *Willard Dairy*, the courts of appeals have consistently construed the Robinson-Patman

Act to require proof of a sale "in commerce". The court in *Central Ice Cream Co.* v. *Golden Rod Ice Cream Co.*, 287 F.2d 265, 267 (7th Cir. 1961), *cert. denied*, 368 U.S. 829 (No. 201, 1961 Term), held that "at least one of the purchases" must be in interstate commerce. *Willard Dairy* was decided by the Sixth Circuit one year later.

In 1964, the Seventh Circuit, in *Borden Co.* v. *FTC*, 339 F.2d 953 (7th Cir. 1964), reaffirmed its own decision in *Central Ice Cream* and agreed with the Sixth Circuit's decision in *Willard Dairy*. A petition for certiorari was not filed in *Borden* since the Solicitor General "declined to act on . . . [the FTC's] request that he seek a Supreme Court ruling." BNA Antitrust & Trade Reg. Rep. #199, p. A-2, May 4, 1965. Recently, *Borden* was described by this Court as being based upon a "want of sufficient interstate connection." *Utah Pie Co.* v. *Continental Baking Co.*, 35 U.S.L. Week 4378 n. 15 (No. 18, 1966 Term).

In the instant case, the Sixth Circuit again considered the relevant authorities and declined to overrule them. There was not one dissent in these four decisions from two separate courts of appeals.

3. Numerous districts courts have also passed upon the commerce requirements of the Robinson-Patman Act and have repeatedly and unanimously construed the statute to require sales "in commerce".[1] Congressman Wright Pat-

---

[1] *Lewis* v. *Shell Oil Co.*, 50 F. Supp. 547, 549 (N.D. Ill. 1943); *Myers* v. *Shell Oil Co.*, 96 F. Supp. 670, 675-76 (S.D. Cal. 1951); *Danko* v. *Shell Oil Co.*, 115 F. Supp. 886 (E.D.N.Y. 1953); *Sears Roebuck & Co.* v. *Blade*, 110 F. Supp. 96, 101 (S.D. Cal. 1953); *Shlomchik* v. *Hygrade Bakery Co.*, 1953 Trade Cas. ¶67,632, p. 68,992; *Northern California M.D. Ass'n* v. *Interment Ass'n*, 120 F. Supp. 93, 95 (S.D. Cal. 1954); *Massachusetts Brewers Ass'n* v. *P. Ballantine & Sons Co.*, 129 F. Supp. 736, 739 (D.Mass. 1955); *Becker* v. *Safelite Glass Corp.*, 1965 Trade Cas. ¶71,587, p. 81,669 (D.Kan. 1965).

man, one of the sponsors of the amendments, and other recognized legal commentators have consistently advised that the statute requires that one of the commodities in an asserted price discrimination must be purchased in interstate commerce.[2] Significantly, the acknowledged congressional intent expressly supports these interpretations of the statute since a contrary position would, in essence, engraft an "effect on commerce" standard onto the Robinson-Patman Act, even though such specific statutory language was struck from a proposed version of the Act.[3]

4. Contrary to petitioner's assertions, none of the aforesaid decisions conflict with this Court's holding in *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115 (1954). There, Mead was selling from its New Mexico plant to purchasers in New Mexico, but "did not cut its prices of bread in Farwell, Texas." 348 U.S. at 117. As this Court expressly found, the three jurisdictional requirements on commerce were present since Mead was "engaged in commerce" and, "in the course of such business", discriminated in price by "maintaining the price in the *interstate* transactions and cutting the price in the *intrastate* sales." 348 U.S. at 118. Petitioner herein has never established, or even sought to establish, that any relevant sale occurred in interstate commerce. Rather, petitioner expressly and deliberately lim-

---

[2] Patman, *Complete Guide to the Robinson-Patman Act*, p. 46-47 (2d ed. 1963); Kintner, *An Antitrust Primer*, p. 61, (1964); Rowe, *Price Discrimination Under the Robinson-Patman Act*, pp. 78-80 (1962).

[3] H.R. Rep. No. 2951, 74th Cong. 2d Sess., p. 6 (1936); Rowe, *op. cit supra.* at 78; *Becker* v. *Safelite Glass Corp.*, 1965 Trade Cas. ¶71,587, p. 81,669 (D.Kan. 1965).

ited its allegations and its proof to transactions entirely within the State of Michigan.[4]

Petitioner's suggestion that *Moore* is pertinent because a corporate treasury was used to finance predatory price cutting has no foundation in either the pleadings or the evidence. No such allegation was made in the Amended Complaint [Appendix below, pp. 9a-10a];[5] moreover, petitioner has conceded that *respondent was not responsible for the price wars that occurred* in the market area or for the claimed substantial loss which petitioner suffered at that time [Appendix below, pp. 22b-26b]. Furthermore, petitioner acknowledged that it purchased from another source for substantially the same price as the price of respondent about which petitioner complained [Appendix below, p. 12b], and respondent, by sworn interrogatory answer, denied its price was below cost [Appendix below, pp. 14b-15b]. There is no factual basis whatsoever for now suggesting that predatory price cutting was ever an issue, or even an assertion, in this litigation.

CONCLUSION

Respondent respectfully submits that this case was rightly decided by the District Court and Court of Appeals, that the statutory provision has been uniformly and consistently interpreted by several courts of appeals and numerous district courts, that no issue of fundamental importance or

---

[4] "The amended complaint alleges price-discrimination by respondent in the sale of milk, milk products, and retail items *within the State of Michigan.*" Petition for Cert., p. 3 (emphasis supplied).

[5] Respondent's references to the record below follow the method of citation described in footnote 1 of the Petition for Cert.

novel question of law is raised by the petition for a writ of certiorari, and that the petition therefore should be denied.

Respectfully submitted,

DAVID J. GIBBONS

GORDON B. WHEELER
Attorneys for Respondent
National Dairy Products Corporation

Dated: May 8, 1967

Of Counsel:
CHADWELL, KECK, KAYSER,
RUGGLES & MCLAREN
135 South LaSalle Street
Chicago, Illinois 60603

WHEELER, UPHAM, BRYANT & UHL
620 Old Kent Building
Grand Rapids, Michigan 49502